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The Federal Sentencing Guidelines' Abuse of Trust Enhancement: An Argument for the Professional Discretion Approach

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NOTE

THE FEDERAL SENTENCING GUIDELINES' ABUSE OF TRUST ENHANCEMENT: AN ARGUMENT FOR THE PROFESSIONAL DISCRETION APPROACH

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I. INTRODUCTION

In a national issue of first impression for the circuit courts,[1] the Eleventh Circuit, in *United States v. Louis*, held that a federally licensed firearm dealer who knowingly sells a firearm to a convicted felon should not receive additional punishment for abusing a position of public or private trust under the Federal Sentencing Guidelines (Guidelines).[2] Under *Louis*, a licensed firearm dealer does not occupy a position of trust as defined in Guidelines § 3B1.3.[3] The court relied upon the limited discretion the victim—the federal government, as a representative of the people—gave to the dealer to sell firearms.[4] Citing the government's extensive oversight and documentation of firearm dealers, the Eleventh Circuit reasoned that highly regulated firearm dealers lack discretion on how to exercise many aspects of their businesses.[5] Therefore, the firearm dealer lacks a position of trust.

The issue is narrow in scope. Because the Guidelines provide a specific base offense level[6] for anyone who sells a firearm to a convicted felon, a licensed dealer and a black market dealer would receive the same recommended sentence if not for the imposition of the abuse of trust enhancement under Guidelines § 3B1.3.[7] Although the result of both crimes is a convicted felon unlawfully possessing a firearm, licensed

1. *See* United States v. Louis, 559 F.3d 1220, 1226 (11th Cir. 2009). A Seventh Circuit concurring opinion previously considered the issue although counsel did not raise it on appeal. *See* United States v. Podhorn, 549 F.3d 552, 561–65 (7th Cir. 2008) (Ripple, J., concurring).

2. *Louis*, 559 F.3d at 1227–28.

3. *Id.* at 1228.

4. *Id.* at 1227–28.

5. *Id.*

6. The "base offense level" is the starting point for a Guidelines sentence calculation. It is controlled by the most serious crime of conviction. *See* ROGER W. HAINES, JR. ET AL., FEDERAL SENTENCING GUIDELINES HANDBOOK: TEXT AND ANALYSIS 18 (West 2009–2010 ed.).

7. U.S. SENTENCING GUIDELINES MANUAL § 2K2.1(a)(4)(B) (2008) (suggesting a base offense level of twenty for violations of 18 U.S.C. § 922(d) (2006), which provides, "It shall be unlawful for any person to sell . . . any firearm . . . to any person knowing or having reasonable cause to believe that such person . . . (1) is under indictment for, or has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year[.]").

dealers enjoy legal access and authority to import, manufacture, and deal in firearms, while unlicensed dealers lack such authority.[8] Thus, due to the legal sanction and ease with which licensed dealers may access firearms, repeated licensed dealer violations present a greater threat to society. Why, then, does the Eleventh Circuit not hold a licensed firearm dealer, who enjoys the reliance of the community as a gatekeeper[9] of illegal firearm disbursement, more accountable than an unlicensed citizen who enjoys no such reliance? Does such a dealer not violate public trust?

If this issue had been presented to the Third Circuit, the outcome would probably differ. In a factually analogous 2009 case, *United States v. Starnes*,[10] the Third Circuit subjected a subcontractor performing asbestos demolition to the abuse of trust enhancement for falsifying air monitoring reports required by the federal government.[11] Instead of following the Eleventh Circuit's approach—which relied exclusively on the professional discretion the victim gave the defendant—*Starnes* used a hybrid approach. To define a position of trust, the *Starnes* court considered: "'(1) whether the position allows the defendant to commit a difficult-to-detect wrong; (2) the degree of authority which the position vests in [the] defendant vis-á-vis the object of the wrongful act; and (3) whether there has been reliance on the integrity of the person occupying the position.'"[12] In its conclusion, the *Starnes* court heavily referenced the defendant's personal authority over the jobsite that made the defendant's crimes difficult to detect by the victim.[13] However, *Starnes* omitted analysis of the strong oversight of asbestos subcontractors exercised by the federal government through the Environmental Protection Agency (EPA) and other federal agencies.[14] Therefore, the *Starnes* court failed to consider the key—and exclusive—factor in determining the existence of a position of trust—the level of discretion the victim afforded the defendant.

Although the courts reached different conclusions, the facts of both cases stood very similar.[15] Because no direct individual victim existed, the government, as a representative of the people, was the theoretical victim of both crimes.[16] Also, both defendants (1) specialized in vocations involving

8. *See* 18 U.S.C. § 923(a) (2006) ("No person shall engage in the business of importing, manufacturing, or dealing in firearms, or importing or manufacturing ammunition, until he has filed an application with and received a license to do so from the Attorney General.").

9. *See Louis*, 559 F.3d at 1227–28.

10. 583 F.3d 196 (3d Cir. 2009).

11. *Id.* at 217.

12. *Id.* (alteration in original) (quoting United States v. Pardo, 25 F.3d 1187, 1192 (3d Cir. 1994)).

13. *Id.*

14. *See id.*

15. *Compare id.* at 202–05, *with* United States v. Louis, 559 F.3d 1220, 1222–24 (11th Cir. 2009).

16. *See Louis*, 559 F.3d at 1228; *Starnes*, 583 F.3d at 204.

dangerous products;[17] (2) engaged in professions subject to extensive oversight by the government;[18] (3) knowingly violated criminal regulations governing their trades;[19] (4) enjoyed legal access to specifically regulated vocations;[20] and (5) exercised authoritative control, as owners, over their businesses.[21] Despite the similarities, the Eleventh and Third Circuits reached opposite conclusions.

As the above cases illustrate, courts have struggled to find a consistent approach to define "position of trust." In each case, the defendant presents to the court specific responsibilities and duties unique to his individual circumstance.[22] Accordingly, in deciding whether to impose the enhancement, courts must look beyond the defendant's formal title.[23] Thus, the courts must apply an approach to enhancement determination based on the case's facts.[24] Currently, most circuits apply the professional discretion approach exclusively, similar to *Louis*.[25] However, the Second and Fourth Circuits join the Third Circuit and employ hybrid approaches similar to *Starnes*.[26]

Although the courts remain divided on the issue, two circuit courts have recently refocused their attention on the commentary text of § 3B1.3 as amended in 1993, overruled their own precedent, and adopted the professional discretion approach to enhancement imposition.[27] Because the remaining approaches rest on precedent established before the U.S. Sentencing Commission's 1993 Amendment, the Second, Third, and Fourth Circuits should abandon their hybrid approaches and adopt the

17. *Louis*, 559 F.3d at 1222 (firearms); *Starnes*, 583 F.3d at 203 (asbestos).

18. A firearm license requires dealers to comply with all state and local business laws, 18 U.S.C. § 923(d)(1)(F)(ii)(II) (2006); to maintain records on the disposition of firearms, *id.* § 923(g)(1)(A), (3)(A); to submit to warrantless inspection, *id.* § 923(g)(1)(B), (C); to give prompt notice of theft to authorities, *id.* § 923(g)(6); to post the license at the business, *id.* § 923(h); and to refrain from transacting in a motor vehicle, *id.* § 923(j). United States v. Podhorn, 549 F.3d 552, 564 (7th Cir. 2008). Similarly, the EPA sets specific work-practice standards for the handling of asbestos-related materials, 40 C.F.R. §§ 61.145, 61.150 (2010); and the Occupational Safety and Health Administration (OSHA) obligates asbestos contractors to monitor occupational exposure to asbestos by collecting and analyzing on-site air samples, 29 C.F.R. § 1926.1101 (2010). *Starnes*, 583 F.3d at 203.

19. *See Louis*, 559 F.3d at 1223; *Starnes*, 583 F.3d at 203.

20. *Louis*, 559 F.3d at 1222; *Starnes*, 583 F.3d at 202–03.

21. *See Louis*, 559 F.3d at 1222; *Starnes*, 583 F.3d at 203.

22. United States v. Britt, 388 F.3d 1369, 1372 (11th Cir. 2004) ("The determination of whether a defendant occupied a position of trust is extremely fact sensitive.").

23. United States v. Podhorn, 549 F.3d 552, 564 (7th Cir. 2008) ("The focus is not on formal labels; instead, we 'look to the relationship between the defendant and the victim and the *level of responsibility* the defendant was given.'" (quoting United States v. Snook, 366 F.3d 439, 445 (7th Cir. 2004))); United States v. Hernandez, 231 F.3d 1087, 1089 (7th Cir. 2000).

24. *See Britt*, 388 F.3d at 1372.

25. *See infra* notes 237–46 and accompanying text.

26. *See infra* notes 264–70 and accompanying text.

27. *See infra* Parts VI.A, VI.C (discussing the Ninth and Tenth Circuits).

professional discretion approach exclusively.

This Note analyzes the prevalent judicial approaches to § 3B1.3 and explains how some courts erred by advancing the hybrid approach after the 1993 Amendment to § 3B1.3. Part II examines the role of trust in guideline sentencing. Part III discusses the policy behind the Guidelines, including the continuing application of the Guidelines despite the Supreme Court's 2005 *United States v. Booker*[28] decision. Part IV explains different approaches employed by the circuit courts to define a position of trust. Part V highlights the effect of the approach by contrasting the Third Circuit's hybrid with the Eleventh Circuit's professional discretion approach. Finally, Part VI analyses the history of the enhancement and endorses the recent trend towards the application of the professional discretion approach.

II. TRUST AND THE CRIMINAL JUSTICE SYSTEM

In his 2010 State of the Union Address, President Barack Obama cited a "deficit of trust" as the cause of many economic issues facing the nation.[29] However, because scholars and professionals often reference trust as a cause of business success or failure, the President's statement about the role of trust in the economy was not a novel proposition to the American public.[30]

Throughout the Guidelines, examples abound of increased base level offenses due to abuses of trust.[31] However, strong societal disapproval of abusers of trust is no contemporary phenomenon.[32] For example, in Dante Alighieri's classic 14th Century poem *The Inferno*, God punishes fraud and treason harsher than violence and heresy.[33] Dante writes of a God who encases flatterers, corrupt politicians, fraudulent advisors, and traitors in the lowest two circles of hell.[34] Outrage over abuses of trust continues today. Perhaps the most infamous 21st Century example is the child

28. 543 U.S. 220 (2005).

29. President Barack Obama, State of the Union Address (Jan. 27, 2010), *available at* http://www.whitehouse.gov/the-press-office/remarks-president-state-union-address; *see also* Richard Wolf, *We Face a Deficit of Trust*, USA TODAY, Jan. 28, 2010, at 1A.

30. *See, e.g.*, John O. Whitney, *The Economics of Mistrust*, 81 B.U. L. REV. 687, 687 (2001) ("Mistrust within organizations doubles costs, diverts attention from customers, stifles innovation, and saps the vitality of the firm and its people.").

31. *See* Joshua A. Kobrin, *Placing Trust in the Guidelines: Methods and Meanings in the Application of Section 3B1.3, the Sentence Enhancement for Abusing a Position of Trust*, 12 ROGER WILLIAMS U. L. REV. 121, 130 (2006).

32. *See* Paul G. Chevigny, *From Betrayal to Violence: Dante's* Inferno *and the Social Construction of Crime*, 26 LAW & SOC. INQUIRY 787 (2001) (arguing that modern criminal law does not adequately penalize the impact of betrayal).

33. *See* Chevigny, *supra* note 32, at 787.

34. *See* DANTE ALIGHIERI, THE INFERNO 147–49 (flatterers), 167–69 (corrupt politicians), 217–23 (fraudulent advisors), 275–77 (traitors) (Allan Gilbert trans., Duke Univ. Press 1969).

molestation scandal that first rocked the Catholic Church in 2002.[35] Other recent abuses of trust include disgraced Wall Street financier Bernie Madoff's Ponzi scheme,[36] Illinois Governor Rod Blagojevich's pay-for-play transactions,[37] and Alaska Senator Ted Stevens' home renovations.[38]

Ironically, criminal culture also condemns any perceived abuse of trust. For example, the term "rat" long ago entered mainstream use to identify a mafia insider who came forward as a witness or cooperated with police.[39] In urban culture, the "stop snitching" campaign, a movement that threatens violence against informants, has acquired a nationwide foothold.[40] Even inside police departments, fellow officers practice the "blue wall of silence," a code that forbids reporting another colleague's misconduct.[41]

Additionally, trust plays a vital role in criminal sentencing. The criminal justice system views betrayers of trust as more culpable than other criminals.[42] As the U.S. Sentencing Commission stated in Amendment 666[43] to the Guidelines, "the Commission's view [is] that offenders who abuse their positions of public trust are inherently more culpable than those who seek to corrupt them, and their offenses present a somewhat greater threat. . . ."[44] In Amendment 666 alone, the Commission increased the base offense level for crimes that involved offering, giving, soliciting, or receiving a bribe; offering, giving, soliciting, or receiving a gratuity; and

35. *See, e.g.*, Matt Carroll et al., *Church Allowed Abuse by Priest for Years*, BOSTON GLOBE, Jan. 6, 2002, at A1; Matt Carroll et al., *Geoghan Preferred Preying on Poorer Children*, BOSTON GLOBE, Jan. 7, 2002, at A1.

36. *See* Robert Frank et al., *Madoff Jailed After Admitting Epic Scam*, WALL ST. J., Mar. 13, 2009, at A1, *available at http://online.wsj.com/article/SB123685693449906551.html?mod=djemalertNEWS*; *see also* Diana B. Henriques, *Madoff Is Sentenced to 150 Years for Ponzi Scheme*, N.Y. TIMES, June 29, 2009, http://www.nytimes.com/2009/06/30/business/30madoff.html?_r=1&hp.

37. *See* Jeff Coen et al., *Blagojevich Arrested; Fitzgerald Calls It a 'Political Corruption Crime Spree'*, CHI. TRIB., Dec. 10, 2008, http://www.chicagotribune.com/news/local/chi-rod-blagojevich-1209,0,7997804.story.

38. *See* Richard Mauer, *Feds Eye Stevens' Home Remodeling Project*, ANCHORAGE DAILY NEWS (Alaska), May 29, 2007, http://www.adn.com/2007/05/29/46602/feds-eye-stevens-home-remodeling.html.

39. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1884 (1993).

40. The "stop snitching" campaign gained national notoriety in 2004 when Denver Nuggets forward Carmelo Anthony appeared in a DVD produced by his childhood friends entitled *Stop Snitching*. Tom Farrey, *'Snitching' Controversy Goes Well Beyond 'Melo*, ESPN THE MAG., Jan. 18, 2006, http://sports.espn.go.com/nba/columns/story?columnist=farrey_tom&id=2296590. Although the creators of the DVD directed the message towards a particular West Baltimore drug kingpin who became an informant, police recognize that the campaign has hampered their ability to convince law-abiding citizens to come forward with helpful information. *Id.*

41. For a look into the code of silence within a police department, see Gabriel J. Chin & Scott C. Wells, *The "Blue Wall of Silence" as Evidence of Bias and Motive to Lie: A New Approach to Police Perjury*, 59 U. PITT. L. REV. 233 (1998).

42. *See* U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 666 (effective Nov. 1, 2004).

43. Amendment 666 increased the base offense level for certain public corruption offenses. *Id.* The Commission felt that "public corruption offenses previously did not receive punishment commensurate with the gravity of such offenses." *Id.*

44. *Id.*

depriving the public of the intangible right to the honest services of public officials.[45]

At bottom, all criminals abuse public trust in some manner. For example, when entering a convenience store, a patron trusts that he will not be robbed at knifepoint; when hailing a cab home in a city late at night, a partygoer trusts that the cab driver is charging the regulated fee. The Commission's abuse of trust provisions concern not the normal perpetrator[46] but those who commit acts that undermine an organizational foundation. For abuse of trust enhancements, the Commission's paramount concern is with damage to an organization or society as a whole, not necessarily with damage to the individual directly affected by the crime.[47] For example, although a custodian who sexually abuses a child in his care inflicts the same level of damage to the molested child as a stranger who commits the same crime, the custodian also undermines the public trust of the custodial system. Thus, despite equal damage to the individual when other perpetrators perform the same criminal acts, abusers of trust receive harsher penalties because they undermine the systems and vocations that they serve.

III. THE FEDERAL SENTENCING GUIDELINES

A. *Seeking Uniformity: The Policy Behind the Guidelines*

Prior to the passage of the Sentencing Reform Act of 1984 (the Act),[48] district court judges enjoyed broad discretion over criminal penalties.[49] Growing concern over sentencing disparity amongst similar offenses prompted Congress to pursue reform.[50] Prior to the establishment of the Guidelines, statutes that provided only a maximum term of years or monetary fine drove federal sentencing.[51] As U.S. District Court Judge Marvin Frankel[52] famously wrote in his troubling 1973 book, *Criminal Sentences, Law Without Order or Limit*, "the almost wholly unchecked and

45. *Id.*

46. *See* Kobrin, *supra* note 31, at 130.

47. *See id.*

48. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended at 18 U.S.C. §§ 3551–59, 3561–66, 3571–74, 3581–86 (2006) and 28 U.S.C. §§ 991–98 (2006)).

49. Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 225 (1993).

50. *Id.* at 228.

51. *Id.*

52. Judge Marvin Frankel served as a U.S. District Court Judge in the Southern District of New York for fifteen years. *Id.* at 228. Senator Edward Kennedy, credited with introducing the first sentencing reform bill in 1975, referred to Judge Frankel as the "'father of sentencing reform.'" *Id.* 225, 228. In the 1950s, sentencing judges began to face criticism from both sides of the political spectrum. *Id.* at 227. While critics on the left complained that (1) the rehabilitation attribute of sentencing punishment remained impotent; (2) indeterminacy of their sentences led prisoners to increased anxiety,; and (3) the disparity in sentencing stood at odds with equality ideals, critics on the right complained that sentencing judges and parole officers were too lenient on criminals. *Id.*

sweeping powers we give to judges in the fashioning of sentences are terrifying and intolerable for a society that professes devotion to the rule of law."[53] These statutes left judges free to impose any sentence below the maximum prescribed by Congress.[54]

With the passage of the Act in 1984, Congress established the U.S. Sentencing Commission, an independent judicial agency composed of seven voting members and two non-voting members,[55] and delegated broad authority to review the federal sentencing process.[56] Congress sought to achieve the goals of (1) establishing honesty; (2) creating reasonable uniformity; and (3) achieving proportionality in federal sentencing.[57] However, Congress failed to adopt any concrete punishment philosophy, instead leaving the Commission to "reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process[.]"[58] Working with the directive codified in 28 U.S.C. § 991 to balance the competing goals of retribution, deterrence, incapacitation, and rehabilitation,[59] the Commission submitted its initial Guidelines to Congress in 1987, and after the prescribed period of congressional review, the Guidelines took effect on November 1, 1987.[60]

B. *The Pre-*Booker *Mandatory Imposition of Guideline Sentencing*

Drawing on the need to limit sentencing disparity and, in turn, limit the broad discretion of district court judges, Congress required judges to impose sentences within the appropriate guideline ranges.[61] 18 U.S.C. § 3553(b)(1) provides:

> [T]he court *shall* impose a sentence of the kind, and within the range [of the applicable category of offense] unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a

53. MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 5 (1972). "The central purpose of this small volume is to seek the attention of literate citizens—not primarily lawyers and judges, but not excluding them—for gross evils and defaults in what is probably the most critical point in our system of administering criminal justice, the imposition of sentence." *Id.* at vii.

54. *See id.*

55. HAINES, JR. ET AL., *supra* note 6, at 1.

56. *Id.*

57. U.S. SENTENCING GUIDELINES MANUAL § 1A1.3 (2008).

58. 28 U.S.C. § 991(b)(1)(C) (2006).

59. 28 U.S.C. § 991(b)(1)(B); *see also* KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 52 (1998). For an argument that retributive sentencing impedes meaningful reform, see Alice Ristroph, *How (Not) to Think Like a Punisher*, 61 FLA. L. REV. 727 (2009).

60. *See* HAINES, JR. ET AL., *supra* note 6, at 2. For a concise overview of the guidelines sentencing process, see *id.* at 17–20.

61. *See* 18 U.S.C. § 3553(b)(1) (2006); S. Rep. No. 98-225, at 79 (1983).

> circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission.[62]

Thus, a judge could only depart from the applicable sentencing range for an "aggravating or mitigating circumstance."[63] In either circumstance, the sentencing judge must cite a relevant fact that was not taken into consideration by the Guidelines, but remains consistent with the Commission's sentencing policy.[64] Proper reasons for an upward departure include the psychological impact on a victim,[65] an excessive history of committing the same crime,[66] and the vulnerability of a victim.[67] Examples of mitigating circumstances include a defendant's vulnerability to abuse in prison,[68] a defendant's withdrawal from criminal activity before arrest,[69] and assistance from a third party.[70] However, in most cases, aggravating and mitigating departures are unavailable because the Commission included most relevant factors in the Guidelines.[71] For example, premeditation is an impermissible reason for a departure because the Commission has already accounted for it in the Guidelines.[72] Thus, in the vast majority of cases, the judge must impose a sentence within the Guideline range.[73] The mandatory nature of the Guidelines led to the Supreme Court's decision in *United States v. Booker*, which struck down § 3553(b)(1) for an "advisory" regime.[74]

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62. 18 U.S.C. § 3553(b)(1) (emphasis added). Section 3742(e) also depended on "the Guidelines' mandatory nature." United States v. Booker, 543 U.S. 220, 245 (2005).

63. *See* 18 U.S.C. § 3553(b)(1).

64. *See id.*

65. United States v. Lucas, 889 F.2d 697, 701 (6th Cir. 1989) (upholding upward departure where bank robber forced tellers and customers to disrobe).

66. United States v. Chase, 894 F.2d 488, 492 (1st Cir. 1990) (upholding upward departure where a defendant committed fourteen bank robberies and the Guidelines lacked additional penalties for robberies beyond five).

67. United States v. Melvin, 187 F.3d 1316, 1323 (11th Cir. 1999) (upholding an upward departure for the offense of trafficking in fraudulent credit card accounts where the defendant obtained the accounts in the names of hospitalized children).

68. United States v. Lara, 905 F.2d 599, 603, 609 (2d Cir. 1990) (holding that defendant's "immature appearance, bisexual orientation and fragility" entitled him to a downward departure).

69. United States v. Buchanan, 213 F.3d 302, 313 (6th Cir. 2000) (holding that the district court was obligated to consider the defendant's withdrawal of criminal activity before his arrest).

70. United States v. Abercrombie, 59 F. Supp. 2d 585, 592 (S.D. W. Va. 1999) (granting downward departure where a third party's assistance in an investigation was substantial and third party would not have assisted the government if not for the defendant's plight).

71. United States v. Booker, 543 U.S. 220, 234 (2005).

72. United States v. Kelly, 1 F.3d 1137, 1141 (10th Cir. 1993) (holding that because premeditation is the only distinguishing factor between first and second degree murder, an upward departure for premeditation in a second degree murder conviction is improper).

73. *Booker*, 543 U.S. at 234.

74. *See infra* Part III.C.

C. *Guideline Relevance After* Booker

After the Supreme Court's decision in *Blakely v. Washington*,[75] which struck down Washington's mandatory sentencing structure as a violation of the Sixth Amendment's right to trial by jury, some commentators, including Justice Sandra Day O'Connor, feared that based on the majority's analysis, the mandatory Federal Sentencing Guidelines were also unconstitutional.[76] Two years later, in *United States v. Booker*, the Supreme Court ended the compulsory nature of the Guidelines, striking down as violations of the Sixth Amendment[77] 18 U.S.C. §§ 3553(b)(1)[78] and 3742(e),[79] which dictated the mandatory implementation of the Guidelines.[80]

The facts in *Booker* were abnormally egregious. The government charged the defendant, Freddie Booker, with possession of at least fifty grams of crack cocaine with intent to distribute.[81] After a jury returned a guilty verdict, the Guidelines subjected Booker to a base sentence of no more than 262 months in prison.[82] However, at a post-trial sentencing hearing, the district court judge found that Booker possessed an additional 566 grams of crack.[83] The judge also found Booker guilty of obstructing justice.[84] Accordingly, Booker became subject to a new maximum sentence of life in prison.[85]

Justice John Paul Stevens, writing for the majority in part, expressed particular concern that the Guidelines allowed judges to determine facts

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75. 542 U.S. 296 (2004).

76. *See id.* at 325 (O'Connor, J., dissenting) ("The structure of the Federal Guidelines likewise does not . . . provide any grounds for distinction. . . . If anything, the structural differences that do exist make the Federal Guidelines more vulnerable to attack.").

77. United States v. Booker, 543 U.S. 220, 245 (2005).

78. Section 3553(b)(1) provides in pertinent part: "[T]he court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." 18 U.S.C. § 3553(b)(1) (2006).

79. Section 3742(e) provides in pertinent part: "Upon review of the record, the court of appeals shall determine whether the sentence . . . is outside the applicable guideline range, and . . . the sentence departs from the applicable guideline range based on a factor that . . . is not authorized under section 3553(b) . . . ." 18 U.S.C. § 3742(e) *passim* (2006).

80. In *Mistretta v. United States*, 488 U.S. 361 (1988), Justice Harry A. Blackmun noted that Congress settled on a mandatory-guideline system. *Id.* at 367. Justice Blackmun relied on the Senate Judiciary Committee's rejection of a proposal that would have enacted the guidelines as advisory. *Id.*; *see also* S. Rep. No. 98-225, at 79 (1983).

81. United States v. Booker, 543 U.S. 220, 227 (2005).

82. *Id.*

83. *Id.*

84. *Id.*

85. Based on the facts proven to the jury beyond a reasonable doubt, Booker was eligible for a maximum sentence of 262 months. Instead, the district court judge sentenced Booker to 360 months in prison, based on facts not proven to a jury beyond a reasonable doubt. *Id.*

relevant to sentencing without a decision by a jury.[86] Five years prior to *Booker*, the Court found this practice unconstitutional in *Apprendi v. New Jersey*.[87] Because Congress made the Guidelines mandatory and the Guidelines promoted the finding of certain facts without the assistance of a jury, the mandatory application provisions in the Guidelines were unconstitutional.[88] The Court reaffirmed its holding in *Apprendi*: "Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt."[89]

According to Justice Stephen Breyer, who wrote the remedy opinion, striking §§ 3553(b)(1) and 3742(e) made the Guidelines advisory:[90] "So modified, the federal sentencing statute . . . makes the Guidelines effectively advisory. It requires a sentencing court to consider Guidelines ranges, but it permits the court to tailor the sentence in light of other statutory concerns as well."[91] Additionally, *Booker* reaffirmed that the circuit courts' standard of review for sentencing decisions is a "review for 'unreasonable[ness].'"[92] Thus, while guideline consultation remains

86. *Id.* at 244.

87. 530 U.S. 466, 494 (2000) ("[T]he relevant inquiry is one not of form, but of effect—does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?").

88. *Booker*, 543 U.S. at 244.

89. *Id.*

90. In regard to the reconstruction of the statute, the Court will sometimes "sharply [bend] the seemingly plain meaning of a statute in order to minimize the statute's arguable unconstitutionality." Akhil Reed Amar, *Bush, Gore, Florida, and the Constitution*, 61 FLA. L. REV. 945, 955 n.39 (2009).

91. *Booker*, 543 U.S. at 245–46 (internal citations omitted); *see also* Kimbrough v. United States, 552 U.S. 85, 111 (2007) (holding that sentencing judges have discretion to impose sentences outside the guideline ranges in cases involving conduct related to manufacture, distribution, or possession of crack cocaine).

92. *Booker*, 543 U.S. at 261 (quoting 18 U.S.C. § 3742(e)(3)(C) (1994)). The sentencing guidance given by the Supreme Court to the lower court is as follows:

> [T]he Sentencing Commission remains in place, writing Guidelines, collecting information about actual district court sentencing decisions, undertaking research, and revising the Guidelines accordingly. . . . The district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing. . . . The courts of appeals review sentencing decisions for unreasonableness.

United States v. Valencia-Aguirre, 409 F. Supp. 2d 1358, 1364 (M.D. Fla. 2006) (citing *Booker*, 543 U.S. at 264). A practical understanding of "reasonable sentence," however, provides a "formidable task" for the lower courts:

> [A]fter nearly twenty years of guidelines sentencing, after hundreds of judicial opinions construing the guidelines, after scores of scholarly articles appraising the supposed virtues and claimed vices of the guidelines, after the accumulation and evaluation of volumes of data by the Sentencing Commission, and after protracted deliberation by Congress, including the investment of a mountain of public

mandatory for sentencing judges, *Booker* prevents mandatory strict application of the Guidelines.[93]

Recent data suggests that, since *Booker*, guideline adherence is slowly decreasing—the disparity between the mean guideline minimum and the average imposed sentence appears to be growing.[94] For example, in the 2004 fiscal year (pre-*Booker*), the median of the quarterly average sentence length was 50.5 months[95] and the median of the quarterly average guideline minimum length was 59 months—a difference of 8.5 months.[96] In fiscal year 2009 (four years after *Booker*), the median of the quarterly average sentence length was 47 months, while the mean guideline minimum length was 57 months—a difference of 10 months.[97] Because of the recency of *Booker*, the question remains whether the disparity will continue to grow. However, even opponents of the Guidelines acknowledge that the Guideline regime, in some capacity, is here to stay.[98]

IV. PREVALENT JUDICIAL APPROACHES TO § 3B1.3

Section 3B1.3 of the Guidelines provides in pertinent part: "If the defendant abused a position of public or private trust . . . in a manner that significantly facilitated the commission or concealment of the offense, increase by 2 levels."[99] Thus, two threshold questions determine the

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> resources, the Supreme Court abruptly disengaged the most thorough and carefully considered regime of criminal sentencing in history and (by the margin of one vote) substituted a two-word regime of criminal sentencing (perhaps the most abbreviated in history)—the regime of the "reasonable sentence," now informed only to some indeterminate and controversial extent by the Sentencing Guidelines.

Id. at 1364–65.

93. *Booker*, 543 U.S. at 264.

94. *See generally* U.S. SENTENCING COMM'N, FINAL QUARTERLY DATA REPORT 2009, at 32 fig.C, *available at* http://www.ussc.gov/Data_and_Statistics/Federal_Sentencing_Statistics/Quarterly_Sentencing_Updates/USSC_2009_Quarter_Report_Final.pdf.

95. *See* E-mail from Timothy Drisko, Research Data Coordinator, U.S. Sentencing Comm'n, to author (Jan. 27, 2011, 12:45 PM EST) (on file with author).

96. *See id.*

97. *See id.*

98. Evangeline A. Zimmerman, *The Federal Sentencing Guidelines: A Misplaced Trust in Mechanical Justice*, 43 U. MICH. J.L. REFORM 841, 867 (2010) (citing José A. Cabranes, *The U.S. Sentencing Guidelines: Where Do We Go From Here?*, 12 FED. SENT'G REP. 208, 208 (2000) ("There is a well-nigh universal agreement that the general outlines of the current system are here to stay. . . . The Guidelines have become deeply entrenched.")).

99. U.S. SENTENCING GUIDELINES MANUAL § 3B1.3 (2010). The entire section reads as follows:

> If the defendant abused a position of public or private trust, or used a special skill, in a manner that significantly facilitated the commission or concealment of the offense, increase by 2 levels. This adjustment may not be employed if an abuse of trust or skill is included in the base offense level or specific offense characteristic. If this adjustment is based upon an abuse of a position of trust, it may be employed in addition to an adjustment under §3B1.1 (Aggravating Role); if this adjustment

application of the abuse of trust enhancement.[100] First, whether the defendant held a position of public or private trust.[101] If so, whether the position of trust "significantly facilitate[d]" commission or concealment of the offense.[102]

Courts find the answer to the second question easier than the first. As § 3B1.3 Application Note One describes, a nexus must exist between the position of trust and the facilitation of the crime: "For this adjustment to apply, the position of public or private trust must have contributed in some significant way to facilitating the commission or concealment of the offense (e.g., by making the detection of the offense or the defendant's responsibility for the offense more difficult)."[103]

In other words, the crime's execution must benefit significantly from the defendant's position of trust. So long as the defendant used the position of trust to further execute the crime, whether the defendant could have executed the crime without the benefit of the trust position is irrelevant.[104] For example, a court will probably withhold the enhancement for a supervisor of elections convicted of a drug offense. However, a court will

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> is based solely on the use of a special skill, it may not be employed in addition to an adjustment under §3B1.1 (Aggravating Role).

Id. Courts apply the "special skill" enhancement distinct from the abuse of trust enhancement. *See id.* The special skill enhancement rests outside the scope of this Note.

100. *See id.*; United States v. Contreras, 581 F.3d 1163, 1165–66 (9th Cir. 2009), *vacated in part by* 593 F.3d 1135 (9th Cir. 2010) (en banc) (per curiam) (agreeing with the original three-judge panel that ruled *United States v. Hill* and its progeny should be overruled).

101. *See* U.S. SENTENCING GUIDELINES MANUAL § 3B1.3 (2010); *Contreras*, 581 F.3d at 1165–66.

102. *See* U.S. SENTENCING GUIDELINES MANUAL § 3B1.3 (2010); *Contreras*, 581 F.3d at 1165–66.

103. U.S. SENTENCING GUIDELINES MANUAL § 3B1.3 cmt n.1 (2010). Application Note One reads in its entirety as follows:

> "Public or private trust" refers to a position of public or private trust characterized by professional or managerial discretion (i.e., substantial discretionary judgment that is ordinarily given considerable deference). Persons holding such positions ordinarily are subject to significantly less supervision than employees whose responsibilities are primarily non-discretionary in nature. For this adjustment to apply, the position of public or private trust must have contributed in some significant way to facilitating the commission or concealment of the offense (e.g., by making the detection of the offense or the defendant's responsibility for the offense more difficult). This adjustment, for example, applies in the case of an embezzlement of a client's funds by an attorney serving as a guardian, a bank executive's fraudulent loan scheme, or the criminal sexual abuse of a patient by a physician under the guise of an examination. This adjustment does not apply in the case of an embezzlement or theft by an ordinary bank teller or hotel clerk because such positions are not characterized by the above-described factors.

Id.

104. United States v. Andrews, 484 F.3d 476, 479 (7th Cir. 2007) ("[A] position of trust significantly facilitates a crime when it makes the crime either easier to commit or more difficult for others to detect.").

likely apply the enhancement if the supervisor of elections commits a voter fraud offense.[105]

Although most "significant facilitation" questions lack such simplicity, the questions are better settled than their counterparts. Answers to whether the defendant occupied a position of public or private trust fluctuate between circuits and even among courts within the same circuit.[106] No consistent judicial clarification to this question has existed since the establishment of the Guidelines.[107]

The Commission provides the definition of "public or private trust" in Application Note One of § 3B1.3: "'Public or private trust' refers to a position of public or private trust characterized by professional or managerial discretion (i.e., substantial discretionary judgment that is ordinarily given considerable deference). Persons holding such positions ordinarily are subject to significantly less supervision than employees whose responsibilities are primarily non-discretionary in nature."[108]

At a minimum, the position of trust must stem from the defendant's relationship with the victim.[109] That is, the victim must actively confer trust upon the defendant, and the defendant must violate that trust.[110] In the "position of trust" realm, this seems to be the only statement in which courts agree. Traditionally, courts use a number of approaches to decide whether an individual occupies a position of trust.[111] However, three distinct approaches most frequently form the case law: (1) access and authority; (2) difficult-to-detect; and (3) professional discretion.[112] Many courts employ combinations, or hybrids, of these three approaches and others.[113]

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105. *See* United States v. Smith, 231 F.3d 800, 819–20 (11th Cir. 2000).

106. *See, e.g.*, *infra* note 119.

107. *See* Kobrin, *supra* note 31, at 132.

108. U.S. SENTENCING GUIDELINES MANUAL § 3B1.3 cmt. n.1 (2010). For the full text of Application Note 1, see *supra* note 103.

109. United States v. Podhorn, 549 F.3d 552, 564 (7th Cir. 2008); *see also* United States v. Hathcoat, 30 F.3d 913, 919 (7th Cir. 1994).

110. *Podhorn*, 549 F.3d at 564; *see also Hathcoat*, 30 F.3d at 919.

111. Some of the factors include:

> (1) the defendant's freedom to commit an easily concealed wrong, (2) whether an abuse of the position can be readily detected, (3) duties of the position relative to other employees, (4) level of specialized knowledge required for the job, (5) the position's authority, and (6) the level of trust placed in the position by the public.

Brian Hendricks, Note, *In Pursuit of Environmental Regulatory Compliance: Should We Flex the "Public Trust" Enhancement Muscle?*, 30 WM. & MARY ENVTL. L. & POL'Y REV. 153, 169 (2005).

112. *See* Kobrin, *supra* note 31, at 131–49.

113. *See, e.g.*, United States v. Dullum, 560 F.3d 133, 140 (3d Cir. 2009); United States v. Akinkoye, 185 F.3d 192, 203 (4th Cir. 1999) ("[F]actors include: (1) whether the defendant had either special duties or '"special access to information not available to other employees'"; (2) the extent of discretion defendant possesses; (3)[ ]whether the defendant's acts indicate that he is '"more culpable" than others' who are in positions similar to his and who engage in criminal acts;

A. *Access and Authority*

Under the access and authority approach, the application of § 3B1.3 relies on the amount of access an employee has to the actions or items that led to the law breaking.[114] The relevant question is "whether trust is inherent to the nature of the position."[115] The theory behind the access and authority approach is that, if significant authority and access authority are given to an employee, then the employee is exercising significant "professional or managerial discretion"[116] even though the employee may not serve directly as a manager.[117] Therefore, such an employee would be subject to the enhancement for abusing a position of trust.

The Commission arguably provides support for the access and authority approach in the definition of public or private trust: "Persons holding such positions ordinarily are subject to significantly less supervision than employees whose responsibilities are primarily non-discretionary in nature."[118] Although confusion reigns as to whether the access and authority approach is sufficient, by itself, to implicate an abuse of public trust,[119] the Third,[120] Fourth,[121] and Seventh Circuits[122] list access and authority as factors in their determinations.

B. *Difficult-to-Detect*

The difficult-to-detect approach originated from the Ninth Circuit's *United States v. Hill*[123] decision. In *Hill*, the defendant—an employee-

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and (4) viewing the entire question of abuse of trust from victim's perspective." (quoting United States v. Gordon, 61 F.3d 263, 269 (4th Cir. 1995)); United States v. Pardo, 25 F.3d 1187, 1192 (3d Cir. 1994) (noting that courts must consider, "(1) [W]hether the position allows the defendant to commit a difficult-to-detect wrong; (2) the degree of authority which the position vests in [the] defendant vis-a-vis [sic] the object of the wrongful act; and (3) whether there has been reliance on the integrity of the person occupying the position."); United States v. Williams, 966 F.2d 555, 557 (10th Cir. 1992).

114. United States v. Lamb, 6 F.3d 415, 419 (7th Cir. 1993).

115. United States v. Brelsford, 982 F.2d 269, 272 (8th Cir. 1992).

116. U.S. SENTENCING GUIDELINES MANUAL § 3B1.3 cmt. n.1 (2008).

117. *See, e.g.*, United States v. Ajiboye, 961 F.2d 892, 895 (9th Cir. 1992) (non-managerial, postal carriers).

118. U.S. SENTENCING GUIDELINES MANUAL § 3B1.3 cmt. n.1 (2008). *But see infra* text accompanying notes 252–56.

119. *Compare* United States v. Dorsey, 27 F.3d 285, 289 (7th Cir. 1994) ("[Position of trust] is characterized by 'access or authority over valuable things.' Of course, access or authority alone is not sufficient." (internal citation omitted)), *with* United States v. Frykholm, 267 F.3d 604, 612 (7th Cir. 2001) ("[Position of trust enhancement] turns upon whether [the defendant] had 'access or authority over . . . valuable things.'").

120. United States v. Starnes, 583 F.3d 196, 217 (3d Cir. 2009).

121. United States v. Pitts, 176 F.3d 239, 246 (4th Cir. 1999).

122. *Dorsey*, 27 F.3d at 289.

123. 915 F.2d 502, 504 (9th Cir. 1990), *overruled by* United States v. Contreras, 581 F.3d 1163, 1165–66 (9th Cir. 2009), *vacated in part by* 593 F.3d 1135 (9th Cir. 2010) (en banc) (per curiam) (agreeing with the original three-judge panel that ruled *United States v. Hill* and its progeny should be overruled).

driver for a national moving company—picked up furniture and household goods for five military families who were relocating to Germany from Missouri and Kansas.[124] Instead of delivering the belongings to the Texas routing point, Hill sold several of the items to various individuals around Licking, Missouri.[125] After a grand jury indictment and a guilty plea of theft of an interstate shipment, the district court judge adjusted Hill's base offense level upward under § 3B1.3.[126] Hill appealed the enhancement, contending that the relationship between a truck driver and the owner of the truck's cargo does not give rise to a position of trust, especially because he was merely a company employee and not specifically sought out by the victims.[127]

In holding that the enhancement was proper, the Ninth Circuit gave birth to the "difficult-to-detect" approach: "[T]he primary trait that distinguishes a person in a position of trust from one who is not is the extent to which the position provides the freedom to commit a difficult-to-detect wrong."[128] The definition relies on (1) the victim's objective ability to determine the defendant's honesty; and (2) the extent to which the defendant's activities can be easily observed.[129] While the court found that the families maintained an objective ability to determine Hill's honesty because they could compare the truck's contents at the destination to its contents prior to leaving the home, the families could not expediently discover Hill's activities because at the time of inspection, they would have been in Germany.[130]

Thus, the theory behind the difficult-to-detect approach is that if a party has the ability to take criminal advantage of another without quick detection, then the party has established a position of trust.[131] For nineteen years, *Hill* reigned as the leading case for the difficult-to-detect approach as well as the entire abuse of trust enhancement.[132] Currently, the hybrid approaches of the Second,[133] Third,[134] and Fourth Circuits[135] still employ elements of *Hill*'s difficult-to-detect approach.

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124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.* at 504–05.
128. *Id.* at 506.
129. *Id.*
130. *Id.* at 506–07.
131. *Id.*
132. *See* United States v. Contreras, 581 F.3d 1163, 1168–69 (9th Cir. 2009) (overruling *Hill*), *vacated in part by* 593 F.3d 1135 (9th Cir. 2010) (en banc) (per curiam) (agreeing with the original three-judge panel that ruled *United States v. Hill* and its progeny should be overruled).
133. United States v. Hirsch, 239 F.3d 221, 227 (2d Cir. 2001).
134. United States v. Starnes, 583 F.3d 196, 217 (3d Cir. 2009).
135. United States v. Gordon, 61 F.3d 263, 269 (4th Cir. 1995).

C. *Professional Discretion*

Under the professional discretion approach, the decisive factor is the amount of managerial or professional discretion vested in the defendant by the victim.[136] The 1993 Amendment to § 3B1.3 provides direct, textual authority for the professional discretion approach:[137] "'Public or private trust' refers to a position of public or private trust characterized by *professional or managerial discretion* (i.e., substantial discretionary judgment that is ordinarily given considerable deference). Persons holding such positions ordinarily are subject to significantly less supervision than employees whose responsibilities are primarily non-discretionary in nature."[138]

Often, professional or managerial discretion manifests itself in a position requiring substantial training.[139] One occupying such a position is given considerable deference because victims often do not understand the technical details of the position.[140] Fiduciary relationships such as doctor-patient or lawyer-client easily fit this description.[141] Additionally, substantial discretionary judgment arises in relationships characterized by an imbalance in power, such as guardian-ward relationships.[142]

On the other side of the spectrum, positions subject to extensive oversight lack substantial discretionary judgment.[143] An ordinary bank teller provides an example of a position not ordinarily subject to the enhancement.[144] Although a bank teller may sometimes have the freedom to act without detection, such a position lacks considerable deference:

> An ordinary teller has no discretion with regard to his dealings with the deposit; he is required by his position to place it in the till. There is no element of discretionary judgment in his position that would permit him to explain properly the absence of that deposit in his till at the end of the day.[145]

In contrast, a patient entrusts his doctor with significant discretion, and "as a result of that discretion, [the doctor] has substantial opportunity to

136. United States v. Louis, 559 F.3d 1220, 1225 (11th Cir. 2009); United States v. Tribble, 206 F.3d 634, 636 (6th Cir. 2000).

137. United States v. Smaw, 22 F.3d 330, 332 (D.C. Cir. 1994).

138. U.S. SENTENCING GUIDELINES MANUAL § 3B1.3 cmt. n.1 (2008) (emphasis added).

139. *See* United States v. Podhorn, 549 F.3d 552, 563 (7th Cir. 2008) (Ripple, J., concurring in part and dissenting in part).

140. *See id.*

141. *Id. See generally* Lisa M. Fairfax, *Trust, the Federal Sentencing Guidelines, and Lessons from Fiduciary Law*, 51 CATH. U. L. REV. 1025 (2002) (analyzing the role of fiduciary law in the Guidelines).

142. *See* Fairfax, *supra* note 141, at 1035.

143. *Podhorn*, 549 F.3d at 564–65 (Ripple, J., concurring in part and dissenting in part).

144. U.S. SENTENCING GUIDELINES MANUAL § 3B1.3 cmt. n.1 (2008).

145. *Podhorn*, 549 F.3d at 564–65 (Ripple, J., concurring in part and dissenting in part).

offer explanations for his criminal conduct . . . ."[146] Thus, to occupy a position of trust under the professional discretion approach, opportunity to commit the crime must arise not only through difficult detection or broad access but must also arise *as a result* of substantial discretionary judgment.[147]

Cases such as *Louis* and *Starnes*, in which defendants own and operate their own businesses subject to extensive government regulation, create more difficult decisions for sentencing courts.[148] On one hand, as the owner of his own business, the defendant is subject to no managerial oversight over daily operations. On the other hand, federal laws place strict requirements on the operation of the business.[149] In such cases, critical evaluation of the victim's specific relationship with the defendant often informs the final determination.[150] Thus, courts should evaluate whether a defendant's criminal opportunity arose as a result of substantial discretionary judgment given by the victim.[151]

Although all circuit courts currently apply professional discretion as at least one factor in their determination, the First, Sixth, Eighth, Ninth, Tenth, Eleventh, and District of Columbia Circuits employ the professional discretion approach exclusively.[152]

D. *Specific Abuse of Trust Enhancements*

Currently, Application Note Two provides two specific situations in which a court must apply the enhancement.[153] In other words, despite the applicable circuit court's interpretation of position of trust, if a sentencing judge is faced with a defendant who qualifies under either situation, the judge must apply the enhancement.[154] The enhancement specifically applies to "[a]n employee of the United States Postal Service who engages in the theft or destruction of undelivered United States mail" and to "[a] defendant who exceeds or abuses the authority of his or her position in order to obtain unlawfully, or use without authority, any means of identification."[155]The Commission initially included the postal service employee enhancement in the 1993 Amendment to the Guidelines.[156] The Commission's official "Reason for Amendment" reads, "This amendment reformulates the definition of an abuse of position of trust to better distinguish cases warranting this enhancement."[157] Although no longer

146. *Id.* at 565 (emphasis omitted).
147. *Id.*
148. *See infra* Part V.B–C.
149. *See infra* Part V.D.
150. *See infra* Part V.D.
151. *See Podhorn*, 549 F.3d at 564–65 (Ripple, J., concurring in part and dissenting in part).
152. *See infra* notes 238–46 and accompanying text.
153. U.S. SENTENCING GUIDELINES MANUAL § 3B1.3 cmt. n.2 (2008).
154. *See id.*
155. *Id.*
156. *See* U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 492 (effective Nov. 1, 2003).
157. *Id.*

included in Application Note Two, the amendment instructed that the Commission insert the language "because of the special nature of the United States mail."[158] Seemingly, the Commission promulgated the amendment to resolve a dispute between the courts as to whether low-level postal employees occupied a position of trust.[159]

The Commission's second automatic enhancement, "means of identification," resulted from a Congressional mandate in the Identity Theft Penalty Enhancement Act (Identity Theft Act).[160] The Identity Theft Act created two new criminal offenses for aggravated identity theft, which "prohibits the unauthorized transfer, use, or possession of a means of identification of another person during, or in relation to, specific enumerated felonies."[161] The Identity Theft Act called on the Commission to "review and amend its guidelines and its policy statements to ensure that the guideline offense levels and enhancements appropriately punish identity theft offenses involving an abuse of position."[162] Additionally, Congress specifically included a reference to § 3B1.3 for offenders who abuse their position of trust to obtain or use an unlawful identification.[163] The Commission responded with Application Note Two, which mandates application of the abuse of trust enhancement if a defendant "exceeds or abuses the authority of his or her position to obtain, transfer, or issue

158. *Id.*

159. *Compare* United States v. Lamb, 6 F.3d 415, 421 (7th Cir. 1993) (finding that a postal letter carrier's access to valuable mail was a direct result of his position and holding that he occupied a position of trust), *and* United States v. Milligan, 958 F.2d 345, 347 (11th Cir. 1992) (rejecting an argument that a postal position was the same as an ordinary bank clerk and applying § 3B1.3), *with* United States v. Tribble, 206 F.3d 634, 637 (6th Cir. 2000) (reversing sentence enhancement for a postal window clerk), *and* United States v. Cuff, 999 F.2d 1396, 1398 (9th Cir. 1993) (per curiam) ("[W]e fail to see any significant distinction between the bank teller who embezzles funds and Cuff, who stole mail packages while employed in unloading them and moving them into the workroom where other employees were located.").

160. Identity Theft Penalty Enhancement Act, Pub. L. No.108-275, 118 Stat. 831 (2004); *see also* U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 677 (2008).

161. U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 677 (2008). The first offense created was an aggravated identity theft provision for those who used a false identification to carry out certain enumerated offenses. 18 U.S.C. § 1028(A)(a)(1) (2006). The second offense was aimed specifically at terrorism:

> Whoever, during and in relation to any felony violation enumerated in section 2332b(g)(5)(B), knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person or a false identification document shall, in addition to the punishment provided for such felony, be sentenced to a term of imprisonment of 5 years.

Id. § 1028A(a)(2).

162. § 5(a), 118 Stat. at 833.

163. § 5(b)(1), 118 Stat. at 833 (requiring the Commission to "Amend [Guidelines] section 3B1.3 . . . to apply to and punish offenses in which the defendant exceeds or abuses the authority of his or her position in order to obtain unlawfully or use without authority any means of identification . . . .").

unlawfully, or use without authority, any means of identification."[164] The automatic enhancements are significant because they signal the willingness of both Congress and the Commission to legislate or promulgate a more specific approach to § 3B1.3 sentencing, if necessary. Thus, either body could legislate or promulgate specific exceptions for federally licensed firearm dealers or asbestos subcontractors.

V. WHY THE APPROACH MATTERS: RECENT ABUSE OF TRUST DECISIONS

Recent circuit opinions highlight the importance of the approach to the enhancement's application. As discussed above, because of the differences in approach, circuit courts are not applying the enhancement consistently to similar facts. Thus, defendants receive different sentences based merely upon jurisdiction. The following cases demonstrate recent examples.

A. United States v. Podhorn *Concurrence: The Professional Discretion Approach Prevents § 3B1.3 Enhancement for a Licensed Firearm Dealer*

In *United States* v. *Podhorn*,[165] the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) obtained a search warrant for the business premises of Paul Podhorn, a federally licensed firearm dealer.[166] Pursuant to the discoveries of the search, a jury convicted Podhorn of two counts of selling stolen firearms, twenty-one counts of selling firearms without maintaining proper records, and one count of failing to maintain proper firearm records.[167] Because Podhorn's counsel failed to challenge the abuse of trust enhancement on appeal, the majority decision did not address it.[168] However, Judge Kenneth F. Ripple, concurring in part and dissenting in part, chose to specifically address whether a federally licensed firearm dealer occupies a position of trust.[169]

Citing Seventh Circuit precedent,[170] Judge Ripple reasoned that the imposition of § 3B1.3 is appropriate only if the victim places the offender in a position of professional or managerial discretion, a position with the type of substantial discretionary judgment that is ordinarily given considerable deference, and the offender abuses that discretion to carry out the offense.[171] According to this reasoning, the government was Podhorn's

164. U.S. SENTENCING GUIDELINES MANUAL § 3B1.3 cmt. n.2 (2008).

165. 549 F.3d 552 (7th Cir. 2008).

166. *Id.* at 555.

167. *Id.*

168. *Id.* at 562 (Ripple, J., concurring in part and dissenting in part) ("Mr. Podhorn has not contended that [a Federal Firearms License] is not a position of either public or private trust. An argument not made on appeal is abandoned, and we need not consider it." (citing United States v. Venters, 539 F.3d 801, 809 (7th Cir. 2008))).

169. *Id.* at 563.

170. *Id.* at 563–64 (citing United States v. Hathcoat, 30 F.3d 913, 919 (7th Cir. 1994)).

171. *Id.*

victim.[172] Thus, in order to hold a position of trust, the government must have placed the Federal Firearm License (FFL) holder, the defendant, in "a position characterized by professional or managerial discretion."[173] Alternatively stated, the government must give the FFL holder a "position with the type of substantial discretionary judgment that is ordinarily given considerable deference."[174]

However, as Judge Ripple noted, the government provides an FFL holder with very little discretionary power.[175] Instead, the government subjects an FFL holder to an extensive list of legal requirements, such as complying with all firearms regulations of federal, state, and local law; maintaining records of every disposition of every firearm; subjecting the premises to inspection without reasonable cause or warrant; and reporting a lost or stolen firearm to local authorities within forty-eight hours.[176] Further, Judge Ripple compared an FFL holder who steals a firearm sent to him for repair to "an ordinary bank teller"[177] who steals a customer's deposit instead of placing it in the till.[178] In the case of the bank teller, the teller holds no element of discretionary judgment that would allow him to properly explain the absence of the deposit.[179] Similarly, the FFL holder maintains no discretionary judgment that would allow him to properly explain the absence of the firearm.[180] Finally, Judge Ripple compared the FFL to a driver's license; even though a driver's license gives its holder the opportunity to commit offenses, the government does not give a driver "substantial discretionary judgment that is ordinarily given considerable deference" just by issuing a driver's license.[181] Instead, a driver's license holder subjects himself to extensive government oversight and, therefore, lacks a position of trust.[182]

In sum, Judge Ripple's concurrence in *Podhorn* provides a thoughtful example of a professional discretion approach to § 3B1.3 determinations. Had Judge Ripple applied a tri-part access and authority, difficult-to-detect, and professional discretion hybrid, the outcome may have been different.[183] A few months later, the Eleventh Circuit agreed with Judge Ripple's concurrence.[184]

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172. *Id.* at 564.

173. *See id.* at 563.

174. *See id.* at 563–64.

175. *Id.* at 564.

176. *See id.*

177. Application Note One explicitly notes that an "ordinary bank teller" does not occupy a position of trust. U.S. SENTENCING GUIDELINES MANUAL § 3B1.3 cmt. n.1 (2008).

178. *Podhorn*, 549 F.3d at 564–65 (Ripple, J., concurring in part and dissenting in part).

179. *Id.* at 565.

180. *Id.*

181. *Id.* at 563, 565.

182. *See id.* at 565.

183. *See infra* Part V.D (discussing the application of different "public trust" tests to the similar fact patterns set out in *Louis* and *Starnes*).

184. *See infra* Part V.B.

B. United States v. Louis: *The Eleventh Circuit Uses the Professional Discretion Approach to Prevent § 3B1.3 Enhancement for a Licensed Firearm Dealer*

In *United States v. Louis*, the ATF, using a paid informant, attempted to purchase a firearm from the defendant, a licensed firearms dealer.[185] After meeting in a used car lot, the informant, a convicted felon, notified the dealer of his criminal past.[186] The dealer asked the informant if a non-felon could complete the required paperwork on the informant's behalf.[187] Days later, the informant returned with an undercover agent, who completed the paperwork. The dealer gave the informant a firearm.[188] A month later, the ATF again arranged for a paid informant to visit the dealer.[189] This time, the informant arrived with an undercover agent.[190] When the informant told the dealer of his criminal history, the dealer asked the undercover agent to complete the paperwork.[191] After completion, the dealer gave the informant a firearm.[192]

After a jury conviction for two counts of selling a firearm to a convicted felon, the presentence report recommended increasing the dealer's offense level two points based on § 3B1.3 for abusing a position of trust.[193] Applying the presentence report's suggestion, the sentencing judge wrote:

> "[T]he public trust, in part, is that the person who is duly licensed and empowered by the government to sell weapons will not sell them in a manner, because they are dangerous instrumentalities, that they will cause or are likely to cause further harm in society, because they're put in the hands of people who have already shown that they cannot comply with the rules and laws of society."[194]

Further, the district court noted that "the public 'trusted' [the dealer] 'to be the first line of defense in preventing criminals from accessing dangerous weapons.'"[195] The judge sentenced the dealer to twenty-seven months in prison and two years of supervised release,[196] a noticeable increase in the basic charge due to sentence enhancements.[197] On appeal,

185. United States v. Louis, 559 F.3d 1220, 1222 (11th Cir. 2009).
186. *Id.*
187. *Id.*
188. *Id.*
189. *Id.* at 1223.
190. *Id.*
191. *Id.*
192. *Id.*
193. *Id.*
194. *Id.* (alteration in original).
195. *Id.* at 1228.
196. *Id.* at 1223.
197. The base offense level was fourteen. *See* U.S. SENTENCING GUIDELINES MANUAL § 2K2.1(a)(6)(B) (2009). The Guidelines call for an upward enhancement of two points because the dealer agreed to sell the first informant five additional firearms. *See id.* § 2K2.1(a)(6)(B), (b)(1)(A).

the Eleventh Circuit reversed the public trust decision.[198] Relying on Judge Ripple's concurrence in *United States v. Podhorn*, Judge William Pryor concluded that "[b]ecause . . . dealers are closely regulated and do not exercise the substantial discretion necessary for a position of public trust, we hold that those licensees are not subject to the abuse-of-trust enhancement."[199] The Eleventh Circuit flatly rejected the "first line of defense" reasoning and noted the district court's lack of analysis about the discretion exercised by firearm dealers.[200] Applied to its end, the district court's reasoning would subject nearly all convicted defendants to § 3B1.3's enhancement because for every crime, the public, in some way, trusts one who commits the crime.

Again relying on *Podhorn*, the court reasoned that, to occupy a position of trust, three factors should be considered: professional judgment, discretion, and deference.[201] While FFL holders exercise a significant amount of social responsibility, social responsibility does not imply professional discretion.[202] The court also rejected the government's argument that because Louis was unsupervised, Louis received substantial deference.[203] In doing so, the court highlighted the periodic inspection that immediately proceeded Louis's arrest: "[W]ere it not for this close regulation and supervision, Louis's crime would likely have gone undetected."[204] Given the longer history of the Eleventh Circuit's application of the professional discretion approach,[205] the *Louis* decision comes as less of a surprise than the *Podhorn* concurrence.

C. United States v. Starnes: *The Third Circuit Applies a Hybrid Approach to Impose § 3B1.3 Enhancement to an Asbestos Removal Subcontractor*

In *United States v. Starnes*,[206] a factually analogous case to *Louis* and *Podhorn*, the Third Circuit reached a different conclusion by finding that an asbestos removal subcontractor occupies a position of trust.[207] Starnes, the owner of a demolition company, subcontracted under the Virgin Islands Housing Authority (VIHA) to conduct asbestos-related demolition.[208] The project specifications provided that subcontractors were to perform all

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Plus, another upward enhancement of two points derived from the dealer abusing a position of trust. *See id.* § 3B1.3. As a result, the new offense level was eighteen.

198. *Louis*, 559 F.3d at 1225.

199. *Id.* at 1222.

200. *Id.* at 1228.

201. *Id.* at 1227.

202. *See* U.S. SENTENCING GUIDELINES MANUAL § 3B1.3 cmt. n.1 (2009).

203. *Louis*, 559 F.3d at 1228.

204. *Id.*

205. *See, e.g.*, United States v. Long, 122 F.3d 1360, 1365–66 (11th Cir. 1997).

206. 583 F.3d 196 (3d Cir. 2009).

207. *Id.* at 217 ("[W]e conclude that the District Court correctly determined that Starnes was in a position of trust.").

208. *Id.* at 202.

work in strict accordance with all federal, state, and local regulations.[209] As a former asbestos demolition course instructor, Starnes understood the asbestos abatement procedures and regulations.[210] During the first month of the project, Starnes fell two weeks behind on the VIHA's mandatory daily air-monitoring reports.[211] In response, VIHA sent Starnes a noncompliance notice.[212] The following day, VIHA received twelve signed air-monitoring reports from Starnes, attesting that he analyzed the daily air samples at the site.[213] A week later, an air quality specialist with the Virgin Islands Department of Planning and Natural Resources (DPNR) visited the site and noted deplorable conditions, including workers covered in white powder and visible emissions rising from asbestos-laden ceiling tiles.[214] DPNR issued a stop work order and referred the matter to the EPA.[215] After an EPA investigation that revealed falsified air-monitoring reports, a jury convicted Starnes under the Clean Air Act with three counts of knowingly violating EPA standards for the handling of regulated asbestos and twelve counts of falsifying air-monitoring reports.[216]

On appeal, Starnes contended that the district court erred by finding that he occupied a position of trust under § 3B1.3.[217] Upholding the decision of the district court, the court explained the Third Circuit's position of trust approach as follows:

> In deciding whether a defendant holds a position of trust, a court must consider: "(1) whether the position allows the defendant to commit a difficult-to-detect wrong; (2) the degree of authority which the position vests in [the] defendant vis-á-vis the object of the wrongful act; and (3) whether there has been reliance on the integrity of the person occupying the position."[218]

First, the court noted that, as the owner of the company, Starnes was subject to very little supervision and therefore held substantial "managerial discretion."[219] Accordingly, this discretion facilitated Starnes's crimes and made them "difficult-to-detect."[220] Second, the court concluded that in that same role, Starnes held "significant authority" over the work at the jobsite, including authority over air monitoring.[221] Finally, the court noted that

209. *Id.*
210. *Id.* at 203.
211. *Id.*
212. *Id.*
213. *Id.*
214. *Id.*
215. *Id.*
216. *Id.* at 204–05.
217. *Id.* at 217.
218. *Id*. (alteration in original) (quoting United States v. Pardo, 25 F.3d 1187, 1192 (3d Cir. 1994)).
219. *Id.*
220. *Id.*
221. *Id.*

VIHA relied on Starnes to accurately report the levels of asbestos at the jobsite.[222] Thus, the Third Circuit imposed the enhancement.[223]

D. *Comparing* Louis *and* Starnes

Although the *Starnes* opinion lacks an exhaustive analysis of the issue, it highlights some key differences between the approaches of the Third and Eleventh Circuits. As mentioned at the beginning of this Note, the facts of *Starnes* and *Louis* are strikingly similar.[224] Therefore, if the Third Circuit faced the facts presented in *Louis*, the court would probably have applied the enhancement. First, Louis, just like Starnes, owned and operated his business and, therefore, was subject to no direct supervision. Therefore, Louis maintained "managerial discretion," and this discretion made Louis's illegal sales difficult to detect. In fact, Louis's dealings may have been more inconspicuous than Starnes's dealings. Although Starnes was required to submit air-monitoring reports to the DPNR, VIHA, and EPA, Louis needed to submit documents to the ATF only. Second, Louis, as a sole proprietor and firearm dealer, held "significant authority" over the business, including the choice of whether to sell a firearm to a felon. Third, just like the VIHA "relied on" Louis to make accurate air-monitoring reports, the ATF, the federal government, and society-at-large relied on Louis to be a "gatekeeper" of dangerous firearms.

Conversely, if the Eleventh Circuit faced the facts presented in *Starnes*, the court would probably not apply the § 3B1.3 enhancement. Under the *Louis* rationale, the Eleventh Circuit evaluates the enhancement based on professional judgment, discretion, and deference from the perspective of the victim. Under the *Starnes* facts, the government, as a representative of the people, is the victim of fraudulent air-monitoring reports. Although the government allowed Starnes to exercise significant professional judgment as the owner of his business, the government allowed Starnes little discretion or deference in regard to asbestos air monitoring. Instead, the EPA set specific work-practice standards for the handling of asbestos-related materials and the Occupational Safety and Health Administration (OSHA) obligated asbestos contractors to monitor jobsite air samples. Additionally, the asbestos air-monitoring reports were subject to oversight by four government agencies: DPNR, EPA, OSHA, and VIHA. Hence, the lack of professional discretion given by the government to Starnes likely fails to implicate Starnes under the Eleventh Circuit's § 3B1.3 enhancement approach.

VI. PROGRESSING TOWARD DISCRETION: AN ARGUMENT FOR THE PROFESSIONAL DISCRETION APPROACH

Since the enactment of the Guidelines twenty years ago, courts have struggled to find a consistent definition for a position of trust under

222. *Id.*

223. *Id.*

224. *See supra* text accompanying notes 15–21.

§ 3B1.3. As *Starnes* and *Louis* demonstrate, the application of different approaches often leads to different results.[225] In light of the recent *United States v. Contreras*[226] decision and the plain text of Application Note One as amended in 1993, the remaining courts should adopt the professional discretion approach exclusively.

A. United States v. Contreras: *The Ninth Circuit Rejects the Difficult-to-Detect Approach*

In 2009, the Ninth Circuit explicitly overruled *United States v. Hill*, the genesis of the difficult-to-detect approach.[227] In *United States v. Contreras*, the defendant, a cook at a California state prison, pled guilty to one count of conspiracy to possess with intent to distribute a controlled substance.[228] Before the defendant entered the prison each day, prison officials administered a cursory search of her person.[229] At work, Contreras had unmonitored contact with prisoners in the kitchen.[230] Relying on these liberties, Contreras used tea cans inside her lunch box to smuggle drugs into the prison.[231] Pursuant to the recommendation of the presentencing report, the sentencing court included a two level enhancement for violating a position of trust under § 3B1.3.[232] On appeal, the Ninth Circuit pointed to the text of § 3B1.3's Application Note One, the 1993 guideline amendments, and the resulting confusion in its own case law, and concluded that the *Hill* difficult-to-detect approach should never have survived the 1993 amendments.[233]

Prior to the 1993 amendments, § 3B1.3's Application Note One read that the position "must have contributed in some substantial way to facilitating the crime and not merely have provided an opportunity that could as easily have been afforded to other persons."[234] However, in 1993, in order to "better distinguish cases warranting this enhancement,"[235] the Commission amended Application Note One to read: "'Public or private trust' refers to a position of public or private trust characterized *by professional or managerial discretion* (i.e., substantial discretionary judgment that is ordinarily given considerable deference). Persons holding such positions ordinarily are subject to significantly less supervision than employees whose responsibilities are primarily non-discretionary in nature."[236]

225. *See supra* notes 1–21 and accompanying text.
226. 581 F.3d 1163 (9th Cir. 2009).
227. *Id.* at 1164.
228. *Id.* at 1164–65.
229. *Id.* at 1164.
230. *Id.*
231. *Id.*
232. *Id.* at 1165.
233. *Id.* at 1165–66.
234. U.S. SENTENCING GUIDELINES MANUAL § 3B1.3 cmt. n.1 (1990).
235. *Id.* at app. C, amend. 492 (effective Nov. 1, 1993).
236. *Id.* (emphasis added).

Drawing on the text of the amendment and reasoning from other circuit courts, the Ninth Circuit struck down the difficult-to-detect approach that it had created and followed for nearly twenty years: "Whereas *Hill* assessed whether a defendant had the 'freedom' to commit a crime without 'quick notice,' the commentary instead emphasizes 'professional or managerial discretion.'"[237] The court also noted the evident confusion in its case law since 1993 as it attempted to reconcile the difficult-to-detect approach with the amendment's professional discretion approach: "Continued use of the *Hill* test after 1993 has swept up bank tellers, post office clerks, and supply officers in the enhancement—though none held a position of 'professional or managerial discretion.'"[238] With *Contreras*, the Ninth Circuit joined the First,[239] Sixth,[240] Eighth,[241] Tenth,[242] Eleventh,[243] and District of Columbia Circuits[244] in applying the professional discretion approach exclusively.[245]

While *Contreras* is binding only in the Ninth Circuit, it has nationwide significance. First, it overrules *Hill*, which stood for nearly twenty years as the leading case for defining a position of trust. Second, *Hill* created the difficult-to-detect approach that other circuit courts subsequently employed in their opinions.[246] Thus, *Contreras* calls much of the § 3B1.3 position of trust jurisprudence into serious question.

B. *The Plain Text of the Commission's 1993 Amendment to Application Note One*

With the enactment of the Guidelines in 1990, Congress and the Commission gave little guidance to the courts on how to define a position of trust under § 3B1.3.[247] The position only needed to "have contributed in some substantial way to facilitating the crime and not merely have provided an opportunity that could as easily have been afforded to other persons."[248] The Commission's broad definition understandably led to varying approaches and outcomes amongst the circuit courts.[249] Out of

237. *Contreras*, 581 F.3d at 1166 (internal citation omitted).

238. *Id.* at 1167.

239. *See* United States v. Reccko, 151 F.3d 29, 32–33 (1st Cir. 1998).

240. *See* United States v. Tribble, 206 F.3d 634, 637 (6th Cir. 2000).

241. *See* United States v. Trice, 245 F.3d 1041, 1042 (8th Cir. 2001).

242. *See* United States v. Spear, 491 F.3d 1150, 1154 (10th Cir. 2007).

243. *See* United States v. Louis, 559 F.3d 1220, 1225 (11th Cir. 2009).

244. United States v. Smaw, 22 F.3d 330, 332 (D.C. Cir. 1994).

245. United States v. Contreras, 581 F.3d 1163, 1168 (9th Cir. 2009), *vacated in part by* 593 F.3d 1135 (9th Cir. 2010) (en banc) (per curiam) (agreeing with the original three-judge panel that ruled *United States v. Hill* and its progeny should be overruled).

246. *See supra* Part IV.B.

247. *See* U.S. SENTENCING GUIDELINES MANUAL § 3B1.3 cmt. n.1 (1990). The Guidelines commentary binds the courts unless it violates federal law, is inconsistent with the Guidelines themselves, or is based upon a plainly erroneous reading of a guideline provision. *See* Stinson v. United States, 508 U.S. 36, 42–43 (1993).

248. *See* U.S. SENTENCING GUIDELINES MANUAL § 3B1.3 cmt. n.1 (1990).

249. *See* Hendricks, *supra* note 111, at 176.

§ 3B1.3's original definition, today's three most popular approaches were born.[250]

However, in 1993, the Commission amended Application Note One to emphasize professional or managerial discretion: "'Public or private trust' refers to a position of public or private trust characterized by *professional or managerial discretion* (i.e., substantial discretionary judgment that is ordinarily given considerable deference)."[251] Recognizing the gross inconsistencies between circuits in 1993, the Commission sought to "reformulate[] the definition of an abuse of position of trust to better distinguish cases warranting [the § 3B1.3] enhancement."[252] Accordingly, the Application Note explicitly mentions "professional or managerial discretion" and intentionally omits explicit mention of "access and authority" or "difficult-to-detect," despite the latter standards' existence at the time.[253] Of the many approaches available in 1993,[254] the Commission chose to mention only "professional or managerial discretion" in the Amendment.[255] Thus, in its 1993 Amendment, the Commission implicitly approved of the professional discretion approach to § 3B1.3 enhancements.

As noted in *Contreras*, despite the text's plain meaning, many courts continued to adhere to their previous approaches "without addressing or analyzing the change in the law."[256] *Contreras* admonished courts in the Ninth Circuit because instead of addressing the difficult-to-detect approach in 1993, many courts failed to analyze the effect of the amended commentary and to acknowledge that the difficult-to-detect approach preceded the amendments.[257] Thus, the Ninth Circuit essentially ignored the 1993 Amendment for sixteen years until its *Contreras* decision adopted the professional discretion approach.[258]

C. *The Faulty Legal Grounding of the Hybrid Approach*

In 2007, in *United States v. Spear*,[259] the Tenth Circuit rejected its hybrid approach along with a § 3B1.3 enhancement for a federal immigration official convicted of embezzling government funds.[260] Significantly, in its adoption of the professional discretion approach, the

250. *See supra* Part IV.

251. *See* U.S. SENTENCING GUIDELINES MANUAL § 3B1.3 cmt. n.1 (2007) (emphasis added).

252. U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 492 (effective Nov. 1, 1993).

253. *See* U.S. SENTENCING GUIDELINES MANUAL § 3B1.3 cmt. n.1 (2007).

254. *See, e.g.*, United States v. Williams, 966 F.2d 555, 557 (10th Cir. 1992) (employing hybrid approach); United States v. Brelsford, 982 F.2d 269, 272 (8th Cir. 1992) (employing the access and authority approach); United States v. Hill, 915 F.2d 502, 506 (9th Cir. 1990) (employing the difficult-to-detect approach).

255. *See* U.S. SENTENCING GUIDELINES MANUAL § 3B1.3 cmt. n.1 (2009).

256. United States v. Contreras, 581 F.3d 1163, 1167 (9th Cir. 2009) , *vacated in part by* 593 F.3d 1135 (9th Cir. 2010) (en banc) (per curiam) (agreeing with the original three-judge panel that ruled *United States v. Hill* and its progeny should be overruled).

257. *Id.*

258. *Id.*

259. 491 F.3d 1150 (10th Cir. 2007).

260. *Id.* at 1152.

court rejected the prosecution's citation to pre-amendment authority:

> The government relies in part on our 1992 decision in *United States v. Williams*, 966 F.2d 555 (10th Cir. 1992), which identifies several factors to consider in applying the abuse of trust enhancement. That decision, however, predated the significant modifications in [Application Note One] that the United States Sentencing Commission adopted in 1993. . . . In light of the 1993 amendments, *Williams* is of limited significance when evaluating [§] 3B1.3.[261]

As *Spear* implies, after the amendment, the circuit courts should have reevaluated their approaches to defining a position of trust.[262]

However, three circuits have yet to analyze the amendment's effect. Similar to the Ninth Circuit before *Contreras* and the Tenth Circuit before *Spear*, all three of those circuits rely on pre-amendment case law to justify their approaches. For example, in the Third Circuit's first abuse of trust decision after the amendment, *United States v. Pardo*,[263] the court failed to analyze critically the amendment's changes. Instead of refocusing its analysis on the Commission's guidance in the new amendment, the court emphasized its own pre-amendment case law:

> Culling these principles *from our cases*, it follows that in considering whether a position constitutes a position of trust for purposes of § 3B1.3, a court must consider: (1) whether the position allows the defendant to commit a difficult-to-detect wrong; (2) the degree of authority which the position vests in defendant vis-a-vis [sic] the object of the wrongful act; and (3) whether there has been reliance on the integrity of the person occupying the position.[264]

Despite the announcement of the Commission's new definition just six months prior, *Pardo* relegates analysis of the amendment to one brief footnote and fails to use the amendment to redefine a position of trust.[265] Unfortunately, as the Third Circuit's original interpretation of the amendment, *Pardo* stands as its precedential case. Thus, the Third Circuit's § 3B1.3 jurisprudence relies on a decision that ignored the Commission's definition of position of trust as announced in the amendment.

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261. *Id.* at 1154 n.2. Despite *Spear*, two 2008 Tenth Circuit abuse of trust cases reverted back to the hybrid approach. *See* United States v. Gallant, 537 F.3d 1202, 1244 (10th Cir. 2008); United States v. Chee, 514 F.3d 1106, 1118 (10th Cir. 2008). Both cases prominently cited pre-amendment case law without explanation. *See Gallant*, 537 F.3d at 1244; *Chee*, 514 F.3d at 1118.

262. *See Spear*, 491 F.3d at 1154 n.2.

263. 25 F.3d 1187 (3d Cir. 1994).

264. *Id.* at 1192 (emphasis added).

265. *See id.* at 1191 & n.3.

The Second Circuit has also ignored the 1993 Amendment. In 1994, in its leading case, *United States v. Viola*,[266] the court established the difficult-to-detect approach as an element in its own hybrid approach by citing its own pre-amendment case law.[267] Similarly, in the Fourth Circuit's leading abuse of trust case, *United States v. Gordon*,[268] the court cited four different pre-amendment cases to establish its four-factor hybrid of (1) access and authority; (2) professional discretion; (3) difficult-to-detect; and (4) culpability.[269]

As the cases above illustrate, all hybrid approaches presently in use originated from cases that preceded the amendment or failed to analyze its effect. Because the amendment significantly changed § 3B1.3's position of trust definition, the hybrid approach sits on faulty legal ground. Thus, the Second, Third, and Fourth Circuits should follow *Contreras* and *Spear* and abandon their hybrid approaches.

VII. CONCLUSION

By exclusively evaluating whether a defendant's criminal opportunity arose as a result of substantial discretionary judgment given by the victim, the professional discretion approach best captures the will of the Commission in its 1993 Amendment. Since the amendment, most circuit courts have slowly adopted this approach to define a position of trust. In order to further promote Congress's goal of reasonably uniform sentencing, the remaining courts should adopt the professional discretion approach for § 3B1.3 sentencing.

266. 35 F.3d 37 (2d Cir. 1994).

267. *Id.* at 45 (citing United States v. Castagnet, 936 F.2d 57, 61–62 (2d Cir. 1991)).

268. 61 F.3d 263 (4th Cir. 1995).

269. *Id.* at 269 (citing United States v. Smaw, 993 F.2d 902, 906 (D.C. Cir.1993); United States v. Queen, 4 F.3d 925, 928–29 (10th Cir. 1993); United States v. Johnson, 4 F.3d 904, 916 (10th Cir. 1993); United States v. Hill, 915 F.2d 502, 505–06 (9th Cir. 1990)).